

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re)

Program and System Information)

Protocol (PSIP) Designation for)

Station WJLP(TV) (formerly KVVV(TV)),)

Middletown Township, New Jersey)

FCC Facility ID No. 86537)

MM Docket No. 14-150

ACCEPTED/FILED

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*Federal Communications Commission
Office of the Secretary*

TO: Marlene H. Dortch, Secretary

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APPLICATION FOR REVIEW

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SUMMARY

The Media Bureau's exhaustive treatment of what virtual channel should be assigned to WJLP is remarkable for twisting a matter that is normally automatic and noncontroversial into a complicated assessment of intellectual property rights of licensees in adjacent markets, a realm which lies far outside the Commission's jurisdiction or competence. It is also remarkable for being wrong in every conceivable particular.

1. Although the Bureau's stated purpose was to avoid consumer confusion and the need for multiple changes in cable channel carriage, it has actually created the very confusion and disruption it sought to avoid.
2. The Bureau's Order ignored explicit language in the pertinent ATSC-A/65 protocols that (a) requires stations to be identified by their analog channel if they were operating prior to the DTV transition, and (b) permits and expressly envisions overlapping major channel designations so long as the minor channels are different.
3. The Bureau adopted an idiosyncratic definition of a television "market" which is inconsistent with the market definition used by the Commission for all other purposes and conflicts with the consistent usage of terms in ATSC-A65 Annex B. In so doing, the Bureau ignored the input of one of the framers himself as to how the protocols are to work. The Bureau's approach created the absurd result of WJLP being required to use both channel 26 and channel 33 as its major channel number, something which the ATSC protocols never contemplated, permitted or envisioned, and something which then necessitated some ad hoc footwork to determine which channel should be assigned.

4. The Bureau treated WJLP as “allotted” to the Hartford-New Haven, CT market for purposes of virtual major channel assignment when it is indisputably allotted to the New York television market, not Hartford-New Haven.
5. The Bureau ignored or minimized the fact that over a hundred situations now exist where overlapping major channel numbers operate with no harm or confusion to anyone – including in New Jersey. To date, only WJLP has been singled out for enforcement of the Bureau’s understanding of the PSIP rules.
6. The Bureau changed WJLP’s channel in direct violation of the Spectrum Act.
7. The Bureau unaccountably barred PMCM and other interested parties (including elected representatives from the state of New Jersey) from personally voicing their position on the issues presented.
8. The Bureau failed to account for the unique circumstances under which WJLP was reallocated to New Jersey under a Congressional imperative to have a commercial VHF TV station allotted to New Jersey. By relegating WJLP to virtual channel 33, the Bureau’s Order effectively defeats the statutory purpose.

The Declaratory Ruling Order should therefore be reversed and corrected to assign WJLP virtual channel 3.10 et. seq.)

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QUESTIONS PRESENTED

1. The Spectrum Act absolutely prohibits the Commission from involuntarily changing a TV station's spectrum usage rights or its channel prior to the Incentive Auction. Since the Bureau has determined that a station's virtual channel is its "channel", did the Bureau's involuntary assignment of a different virtual channel to WJLP violate the Act?
2. Did the Bureau misapply the directives of ATSC A/65 Annex B by (i) treating WJLP as a new station which had not previously been assigned a virtual channel when it indisputably had already been assigned such a channel, (ii) treating WJLP as though its channel had been allotted to the Hartford TV market when the Table of Allotments places it in a community in the New York market, (iii) defining a TV market by overlapping service areas in a manner not used by the Annex B framers and not used by the FCC in any other regulatory context, and (iv) ignoring the provisions of Annex B that expressly permit overlapping virtual major channel numbers so long as the minor channels are different?
3. In the absence of any showing whatsoever of confusion to the public during the period of WJLP's operation on virtual channel 3 and given the imperative of the Congressional mandate to ensure a VHF TV station to the people of New Jersey, did the Bureau err in not permitting the use of overlapping major channel numbers as it has permitted to other stations in New Jersey and in more than a hundred other stations across the country?
4. Since declaratory ruling proceedings are presumptively "permit-but-disclose" proceedings for purposes of the ex parte rules, did the Bureau err by treating the proceeding as "restricted," thus precluding PMCM, interested members of the public, and New Jersey's elected representatives from engaging the staff on the issues presented?
5. Does the Bureau's novel interpretation of the Annex B protocols now limit the ability of the Commission to repack stations in the Incentive Auction because the contour of a station's virtual major channel numbers as well as its RF contours are now deemed to be entitled to protection from overlap?

FACTORS WARRANTING COMMISSION REVIEW

1. The matter involves a question of law or policy which has not previously been presented to the full Commission.
2. The Bureau's action is founded on an erroneous finding as to a material fact.
3. The action involved a prejudicial procedural error.
4. The action conflicts with FCC regulations to the extent that it misapplies the ATSC A/65 protocols for assignment of virtual channel numbers.
5. The action directly conflicts with the Spectrum Act by doing precisely what the Spectrum Act forbids.
6. The action undermines the implementation of the Incentive Auction by creating an entirely new set of values which licensees may demand to be protected in the repacking process.

I. Background

PMCM TV, LLC hereby applies to the Commission to review the Media Bureau's June 5, 2015 "*Declaratory Ruling Order*" (DA 15-662) ("*DRO*"). This appeal represents the fourth time PMCM has had to present the issue of its virtual channel to the full Commission. The first time was in its August 25, 2014 Application for Review of the Bureau's action delaying cable carriage while it deliberated about what virtual channel to assign. The second was PMCM's November 10, 2014 Application for Review of the Bureau's temporary assignment of virtual channel 33 to WJLP, coupled with an order to cease operations if it did not use the new channel number. The third was PMCM's accompanying November 10, 2014 Emergency Motion for Stay of the Bureau's interim order directing WJLP to operate on channel 33 or cease operations. Unfortunately, the full Commission has not to date taken the necessary steps to correct the Bureau's errors, creating a situation where the cable systems in the nation's largest market cannot definitively position WJLP where it lawfully belongs, and WJLP cannot establish itself in the market as the New Jersey-based VHF station that Congress ordained. Given that the D.C. Circuit has already ruled that PMCM's position on the merits of the PSIP channel issue is likely to prevail,¹ it is now incumbent on the Commission to act without delay to restore order, reverse the Bureau, and bring this matter to a close.

The *DRO* provides an exhaustive review of the procedural history of this case, a history which we need not repeat here. This matter is actually much simpler than the Bureau's 29-page single-spaced treatise would suggest.

¹ *In re PMCM TV, LLC*, Order, Case No. 14-1238, (D.C. Cir. November 25, 2014)

PMCM TV, LLC ("PMCM") was reallocated to Middletown Township, NJ from Ely, NV under the terms of an act of Congress intended to ensure that each state have a commercial VHF TV allocation -- especially New Jersey, which at the time of enactment lacked such a station because it was surrounded by VHF stations serving Philadelphia and New York. After a nearly four year struggle with the FCC, the D.C. Circuit compelled the Commission to implement the plain language of the statute. PMCM quickly constructed a first class station (now identified by call sign WJLP²) and planned to commence operations late that summer. It had operated on over-the-air analog channel 3 for more than a decade, and had continuously retained channel 3 as its digital channel and major PSIP channel after the digital transition in 2009. When WJLP filed its construction permit application for the station, Meredith Corporation, the licensee of WFSB in Hartford, CT, objected that WJLP's use of PSIP channel 3 would create viewer confusion and impairment of the channel 3 "brand" that it had built up over the years.

The record generated in this docket, however, demonstrated that there was not a single instance of viewer confusion during the many months that WJLP transmitted using virtual channel 3.³ PMCM nevertheless agreed not to demand carriage on channel 3 in the handful of cable systems in Fairfield County, CT where WFSB was being carried on channel 3. Moreover, since there is a massive RF overlap between WFSB's over-the-air channel 33 and CBS's over-the-air channel 3 in New York, there is virtually no over-the-air reception of WFSB in Fairfield County. Any possibility of consumer confusion is further diminished by the fact that any antennas oriented toward Hartford to pick up WFSB would be oriented directly away from WJLP's transmitter

² The station was known as KVVV while it operated in Ely, but for clarity it is referred to here only by its current call sign, WJLP.

³ Not only has there been no confusion by WFSB's viewers, but, to the contrary, many of WJLP's over-the-air viewers have found themselves unable to pick up its signal because some digital receive antennas do not pick up VHF channels. Viewers who search for WJLP on channel 33 cannot find it and are confused because their antenna does not receive over-the-air channel 3.

located at 4 Times Square, NY. WJLP was also careful to adopt a different minor channel than the one used by WFSB (3.10 rather than 3.1) to comply with the PSIP protocols and prevent any possibility of TV receiver confusion. It is therefore not surprising that no one complained.

Nor is there any likelihood of brand confusion since WJLP offers ME-TV (classic TV) network programming with New Jersey news and public affairs coverage, while WFSB offers CBS network programming with news coverage of Hartford. Curiously, although the Media Bureau had permitted what would normally be an unacceptable RF overlap between Meredith's station and CBS's station, it became fixated on preventing non-existent confusion to viewers by delaying and blocking PMCM's use of its assigned *virtual* channel, even after the lack of viewer confusion was confirmed by real world operations. The Bureau therefore initiated this Docket to conduct a lengthy and laborious analysis of the two pages of Annex B, described below, which prescribe which virtual channel a station should use.

PSIPs (Program and System Information Protocols) have been associated with television station signals since the advent of digital TV transmissions. The PSIP is a data stream embedded in broadcast TV transmissions that identifies the transmitting station to receivers and provides call sign information and other basic information to the receiver. Of primary concern here is the channel number that the PSIP includes. The PSIP channel number is composed of two elements: a major channel number – usually the same as the NTSC channel number on which the station broadcast prior to the DTV transition – and a minor channel number which may be used to denominate separate and distinct program streams. This two-part channel number is sometimes called a “virtual channel” because it may not bear any relation to the station's actual over-the-air channel. For example, a station like Washington's WRC historically operated on over-the-air channel 4. After the digital transition, it was assigned over-the-air channel 48, but it continues to identify itself to TV

receivers by its previous major channel number, 4. This is permissible by operation of the ATSC A/65 protocols described below. WRC uses minor channel “.1” to identify its NBC program stream (i.e., 4.1) but offers another network, (Cozi_TV) on subchannel 4.2 which is readily identified by TV receivers as a different channel by the distinct major-minor channel combination. Even completely independent stations operating over different over-the-air channels can share the same virtual major channel number without any confusion to receivers as long as they use a different minor channel number.⁴

The adoption of a virtual channel by a TV station has rarely been the subject of controversy. The numbers are assigned in accordance with a simple two-page set of protocols developed by the Advanced Television Systems Committee in the mid-2000’s. Attached hereto as Annex B are the governing protocols. (We do not here describe these as “rules.” Rather, the FCC left this process to an independent committee of ATS experts who devised the system. Section 73.682(d) of the rules simply incorporates the protocols so developed by reference.) Typically the FCC does not become involved in the PSIP assignment process because the protocols set forth in Annex B are relatively simple to apply and cover almost all eventualities.

In general terms, the protocols are designed to ensure that the “*two-part channel number combinations*” used by a licensee will be different from those used by any other licensee with an overlapping DTV Service Area.” (Annex B 1.1 (8) (Emph. added)) This principle is then implemented by specific paragraphs, of which Paragraphs B.1.1 (1), (4) and (5) are pertinent here. Paragraph (1) provides that a station which transmitted on an analog channel prior to the DTV

⁴ The Bureau’s suggestion at Para. 60 of the *DRO* that the Commission would not be able to figure out who a viewer was complaining about if the viewer referred to channel 3.10 rather than 3.1 in his complaint is just plain silly. If a viewer or the FCC cannot distinguish call sign WJLP broadcasting Me-TV programming from New Jersey from call sign WFSB broadcasting CBS programming from Hartford, the problem lies with them.

transition shall use as its DTV major channel number the same number as it transmitted on before. Since WJLP transmitted on channel 3 during the analog era, it was required to, and did, adopt major channel 3 as its virtual major channel after the DTV transition. That was its over-the-air and virtual channel at the time it relocated to Middletown Township, New Jersey in 2012 by operation of Section 331 of the Communications Act. The *DRO* does not even attempt to explain why this directly pertinent paragraph does not govern the situation.

Paragraph (4) addresses the situation where a station newly-licensed after the DTV transition is allotted to a market on a RF channel that was previously allotted to that market but whose original licensee has been reassigned to a different channel as a result of the DTV transition. In that case, the newly-licensed station is to take as its virtual major channel the over-the-air channel number of the station that has moved to a different channel but is using its previous analog channel number as its virtual channel. A hypothetical example of when this rule would apply would be WFSB in Hartford. That station had operated for many years on channel 3 in the Hartford-New Haven DMA. It was converted to over-the-air channel 33 in the DTV transition, so by operation of Paragraph (1) above, it kept channel 3 as its virtual major channel. If a new RF channel 3 was allotted to the Hartford-New Haven market, any new station taking that channel would have to take 33 as its virtual major channel. If channel 3 had been allotted to the Hartford-New Haven DMA and if WJLP had not already been assigned virtual channel 3 by operation of Paragraph (1), this paragraph would apply. But WJLP's channel was indisputably allotted to the New York DMA,⁵ not the Hartford-New Haven DMA, and it was not a "newly-licensed" station because it had already been assigned a major channel number some years before in accordance with Paragraph (1).

⁵ The Commission's "Post-Transition Table of Allotments" lists channel 3 as being allotted to Middletown Township, New Jersey. 47 C.F.R. §73.622(i). Middletown Township is in the New York DMA.

Finally, Paragraph (5) deals with situations where stations with the same major channels can nevertheless have overlapping coverage areas as long as they have different minor channels. This can occur when commonly-owned stations with overlapping contours choose to voluntarily use the same major channel number. But the Paragraph expressly envisions that non-commonly-owned stations can also have overlapping identical major channel numbers as long as the minor channel numbers are distinct.⁶ As will be seen below, the Bureau ignored Paragraphs (1), discounted the significance of (5), and flagrantly misapplied Paragraph (4), creating a situation never envisioned by the Annex B framers, one where conflicting virtual major channel numbers were required and the Commission had to invent new criteria for cleaning up the mess so created.

II. The Bureau's Action Directly Violates the Spectrum Act

The quickest and easiest way for the Commission to resolve this appeal is by simply obeying the mandate of the Spectrum Act. The Media Bureau has ruled that a television station's over-the-air "channel" is now determined by its virtual channel rather than its RF channel. *KSQA, LLC v. Cox Cable Communications, Inc.*, 27 FCC Rcd. 13185, 13186-7 (Media Bureau, 2012). The Bureau reiterated this view as recently as June 5 of this year when it lifted the embargo on cable carriage of WJLP's station. *Letter to Tara M. Corvo, Esq.*, DA 15-667, rel. June 5, 2015. This definition of what constitutes a station's "channel" was why the Bureau delayed cable carriage of WJLP until its over-the-air channel – i.e., its PSIP channel – was decided. The Media Bureau accords must carry rights to stations only for their virtual channels, not their RF channels. *KSQA, supra*. Television receivers picking up a station's signal off the air identify the received station to viewers by its virtual channel rather than its RF channel. In short, for cable purposes, for off-air

⁶"The values in the minor_channel_number fields shall be partitioned to ensure that there is no duplication of the two-part channel number in the DTV Service Area, including the overlapping DTV Service Areas of other licensees using that same major_channel_number." (Emph. added)

reception purposes, for over-the-air transmission purposes – indeed, for all practical purposes – the Bureau defines a station’s channel as its virtual channel. While PMCM TV vigorously disagrees with the Bureau’s counterintuitive treatment of a station’s over-the-air channel as anything other than its RF channel as designated in the Table of Allotments, the Bureau’s position is what it is. And that being the case, its change of WJLP’s virtual channel flatly and incontrovertibly violated the Act.

The Spectrum Act⁷ imposes a number of specific limitations on the Commission’s ability to act in the run-up to the Incentive Auction. Pertinent here are the provisions of Section 1452(g)(1)(A):

“During the [pre-Incentive Auction] period described in Paragraph 2, the Commission may not –

- (A) Involuntarily modify the spectrum usage rights of a broadcast television licensee or *reassign such a license to another television channel* except –
 - (i) in accordance with this section; or in the case of a violation of its license or a specific provision of a statute administered by the Commission promulgated under any such provision... (Emph. added.)

This provision of the statute could not be clearer. The Commission cannot involuntarily assign a license to a different channel from the one it is on. To underscore the fact that “channel” means something more than just the RF operating characteristics of a channel, the Act separately forbids the Commission from modifying a station’s spectrum usage rights. Here WJLP had operated with virtual channel 3 for almost five years until the Bureau involuntarily and unlawfully reassigned it to another television channel, channel 33.

The *DRO* rather cavalierly brushes over this flagrant violation of the law and of PMCM’s rights as a licensee. It focuses myopically on the first clause of paragraph (A) above (prohibiting

⁷ Middle Class Tax Relief and Job Creation Act, 47 U.S.C. §1452(g)(1)(A)

modification of “spectrum usage rights”) while ignoring the prohibition on reassignment to a different channel. *DRO* at para. 49. Unaccountably, the *DRO* describes PMCM as “apparently conceded[ing] that subsection (g)(1)(A) does not apply,” despite the fact that PMCM’s Reply Comment filed in this Docket on October 29, 2014 at p.6 pointed to precisely this section of the Act as prohibiting any involuntary change in WJLP’s channel. PMCM certainly does not concede in any way that Section 1452(g)(1)(A) does not apply; to the contrary, it exactly controls and prohibits the Bureau’s action here based on its own interpretation of what constitutes a channel.

III. Proper Application of the PSIP Protocols

Annex B of ATSC A/65 is less than two pages long. It fully explains the major channel/minor channel assignment process for virtual channels. As its application is fairly straightforward, it merits a close reading by the Commission. If we read the words laid out there carefully, we can confidently reach the following conclusions:

Paragraph (1) applies to stations that operated under the NTSC (analog) regime at the time of the digital transition. For those stations, the major channel number to be used is the same channel that it operated on under the old regime. Since WJLP operated on channel 3 both before and after the digital transition, the assignment of channel 3 as its virtual channel was mandatory. Nothing in the Annex suggests that a station which moves should lose its major channel number. The *DRO* does not even attempt to explain why the mandate of Paragraph (1) does not apply on its face to WJLP under the PSIP Protocols.

Paragraph (2) applies to new licensees “without an existing NTSC license at the time [they] commenced digital service.” This obviously does not apply since WJLP *did* have an NTSC license

at the time it commenced digital service. Paragraph (3) also does not apply because WJLP's RF channel has not changed.

Paragraph (4), relied on by the Bureau, requires closer scrutiny, but upon such scrutiny is equally inapplicable. It applies to a situation in which "an RF channel previously allotted for NTSC in a market is assigned to a newly-licensed DTV licensee in that market." In that case, the newly-licensed station is assigned the same virtual channel as the RF channel of the station that was previously assigned the NTSC channel to which the new licensee has succeeded. For Paragraph (4) to apply, three separate elements must all be present. Here *none* of them are.

- (a) Allotment. Television channels are "allotted" to communities identified in the Post-Transition Table of Allotments, 47 C.F.R. 73.622(i). "Allotments" are defined by fixed communities of license, not by service areas which can vary with a station's operating parameters. A quick look at the Table confirms that PMCM's station is "allotted" to Middletown Township, NJ which is in the New York DMA. This allotment is totally independent of the station's service contours. Since an NTSC channel 3 was never "previously allotted" to the New York DMA, Paragraph (4) cannot possibly apply. The *DRO* unaccountably ignores the whole concept of allotment, which would have easily confirmed that the market of concern in the Paragraph is the one where the allotted community of license is located, not where a station's signals happen to run.
- (b) Market. Ignoring the allotment criterion, the *DRO* interprets the "market" referred to in Paragraph (4) as consisting of the market created by stations with overlapping service areas, not the station's "Designated Market Area." To confirm the stubborn wrong-headedness of this interpretation, we need only look at the following.

(i) Everywhere else in Annex B where the framers intended to refer to “overlapping DTV Service Areas,” they specifically used that term. In fact, they used the term repeatedly, each time capitalizing Service Area, and using it the context of service contours rather than markets. The framers clearly knew how to say “overlapping DTV Service Areas” when that’s what they meant. The fact that they did *not* refer to overlapping service areas in referring to the “market” here should compellingly convey that they did not mean overlapping service areas.

(ii) The Commission expressly abandoned the use of overlapping service areas to define television markets in 2003.⁸ For all market definition purposes, the Commission itself consistently uses DMAs to define markets. This makes perfect sense since these Nielsen-defined markets most accurately describe actual communities of TV viewing interest. Advertisers use Nielsen markets because they identify real-life markets. So does the Commission. The Bureau does not explain why the ATSC framers would have intended, without any explanation whatsoever, to deviate from the market definition universally and customarily used by the Commission and the industry and instead use one which was abandoned years ago. As will be seen below, the Bureau’s interpretation of the word “market” cannot possibly be correct since it fosters and, indeed, makes inevitable, the very conflicts which the PSIP protocols are designed to prevent.

(iii) Under the Bureau’s theory, a station’s entire “market” is defined by any small area of overlap which it may have with a station sharing the same virtual major

⁸ 2002 Biennial Review, FCC 03-127 (2003)

channel number. That is, even though WJLP serves over 20 million people in New Jersey and New York with its digital channel 3 broadcast signal, has its studios located in New Jersey, and focuses intensively on New Jersey affairs, its “market” is determined by that relatively small area in Connecticut with no actual viewership, where a signal overlap exists. And on that basis it must be assigned a different major channel number which was allotted to the Hartford, CT market. Defining a major market by a small scintilla of its area and population is, frankly, absurd, and cannot possibly have been what the ATSC framers intended.

- (c) Newly-licensed. Paragraph (4) is premised on a “newly-licensed” station being assigned to the market on the RF channel previously assigned to someone else. Such a station would be a blank slate on which the PSIP could be newly superimposed since the station would be taking on a brand new RF channel under a brand new license. But by no stretch of the imagination can this apply to WJLP since its long existence as a licensed station is indisputable and its relocation to New Jersey under the provisions of § 331 of the Act was entirely premised on the fact that it was an existing, licensed station which necessarily had an existing, previously assigned virtual channel.⁹

Apart from the fact that none of the elements necessary to apply Paragraph (4) to this situation are present, one thing we can be absolutely sure of is that the Bureau’s interpretation must be wrong. Its use of overlapping DTV service areas rather than DMAs to define the “market” creates the potential for conflicting major channel assignments, something which is anathema to

⁹ In *KSQA, LLC*, released December 3, 2012, the Video Division ruled that a station would be deemed a “new broadcaster” if it did not have an NTSC license prior to the digital transition. Since WJLP did have an NTSC license, it does not in any way qualify as “new.”

Annex B. If DMAs are used to define the “markets,” as PMCM believes the framers intended, then there would always be a unique major channel number assigned to stations in each market – exactly as Annex B requires. Where there is overlap of service areas from one DMA market into another, as occasionally happens and as happens here, the overlap can be dealt with by using different *minor* channels. This solution perfectly harmonizes the virtual channel assignment process and is precisely the solution proffered by PMCM. By using the “3.10” et seq. major/minor channel combination, WJLP can happily co-exist with KYW in Philadelphia (which uses “3.1”) and WFSB in Hartford (which also uses 3.1). Since neither of those two stations overlap with each other, they are fine. This approach works on all pertinent levels: (i) it ensures, as Paragraph (8) of Annex B requires, that each station in a DMA-defined market has a unique major channel assignment. Since KYW, WJLP and WFSB are each in different DMA-defined markets, they can each use channel 3 as their major channel. (ii) It ensures that there is a unique “two-part channel number for all stations with overlapping DTV service areas,” as Annex B, Paragraph (8) also requires. (iii) And WJLP’s real world operations on virtual channel 3.10 for four months confirmed that there was no consumer confusion, no “virtual interference,” and, in short, no problem of any kind with this channel assignment.¹⁰

By contrast, the Bureau’s solution virtually guarantees, as it did here, that duplicative major channel numbers would be mandatorily assigned in the vast markets created by overlapping service areas. In the Bureau’s view, WJLP’s “market” extends from Maryland (where KYW’s channel 3 in Philadelphia reaches, to Rhode Island, where WHPX in New London reaches. Using the Bureau’s

¹⁰ The Bureau’s example of an “absurd” result resulting from this approach in situations where the DMAs are quite large such as Salt Lake City is just wrong. *DOR* at Para. 36. Even though there might not be any signal overlap of widely separated stations in a DMA, because many station rights such as cable carriage are predicated on DMA boundaries, it makes sense to be sure even in a DMA as large as Salt Lake City that only one station is assigned a major channel number in the DMA. In any event, the application of the PMCM approach in large DMAs does no harm to anyone, while the Bureau’s approach, as discussed hereafter, creates hopelessly conflicting channel assignments.

market definition, since WJLP's signal overlaps the Philadelphia station's service area's contour, it *must* be assigned that station's RF channel as its PSIP number by operation of Paragraph (4) of Annex B. That number is 26. However, since, WJLP's service area also overlap's WFSB's service contour in Fairfield County, WJLP *must* be assigned channel 33 by operation of Paragraph (4). So we already have an impossibility under the principles of Annex B – two different major channel numbers that *must* be assigned to the same station. To make matters worse, channel 26, which is WHPX's major channel number in New London, also overlaps WJLP's service area in Connecticut. So even if channel 33 were not in the picture, the assignment of channel 26 would have conflicted under the Bureau's interpretation with WHPX's use of that channel.

Somehow the Bureau concluded that this approach would preserve the single most important governing principle of the PSIP protocols: that there be only one major channel uniquely assigned to a market. Yet its application in this case resulted in the exact opposite – a tangled spaghetti plate of overlapping service areas forming a single gigantic market from New England almost to Washington, DC where two, three or maybe more major channel numbers would all be required to be mandatorily assigned. Having created an illogical mess not contemplated by the elegant Annex B model, the Bureau then had to try to fix the mess by perfunctorily assigning WJLP to channel 33 rather than channel 26 because channel 26 was “not available.” *DRO* at footnote 108. Nothing in Annex B permits or contemplates such ad hoc patches being applied -- because there should never be a situation where a major channel number required by Annex B is “not available.”

Finally, Paragraph (5) provides an important key to the virtual channel puzzle. It provides that commonly owned stations with overlapping DTV service areas can adopt the same major channel number regardless of the application of the other Paragraphs of Annex B, as long as they have distinct minor channel numbers. This establishes the important principle that the system

works fine as long as unique *two-part* virtual channel numbers are used by overlapping stations, as PMCM has contended. But more importantly, Paragraph (5) also notes that the two-part channel numbers must be distinct from those used by *other licensees* with overlapping service areas who are also sharing the same major channel numbers! This firmly establishes the very principle rejected by the Bureau's interpretation of Annex B: that overlapping, non-commonly owned stations *can* share the same major channel. The Bureau observes that this situation "would rarely occur" and accordingly discounts this critical language as "incidental" and "not expand[ing] the scope" of Paragraph (5). *DRO* at Para. 46. Incidental or not, the provision fully supports the interpretation propounded by PMCM that harmoniously and coherently systematizes the way Annex B is supposed to work. It provides a way of dealing with outlier overlapping service areas without disturbing the basic structure of the virtual channel assignment process.

To support its bizarre interpretation of Annex B, the Bureau turned to a paper written by the Chair of the ATSC technical group, a Mr. Eyer. That paper unfortunately is less than helpful since Mr. Eyer explains generally the working of Paragraph (4) without telling us what market area he is talking about. He uses the word "area" colloquially to refer to the geographic area where a new entrant requires the assignment of a new virtual channel, but he seems to simply have used "area" as a synonym for "market" as used in Paragraph (5), which leaves us exactly where we were to begin with. By contrast, PMCM sought the input of Dr. Richard Chernock, the chairman of the pertinent ATSC group which devised Annex B, regarding the application of Annex B to the specific question presented here, i.e., what do you do when application of the protocols results in assignment of the same major channel number to two stations with overlapping service areas? It was Dr. Chernock *himself* who suggested that using different major/minor channel combos to deal with overlapping major channel numbers would work technically and would be fully consistent with Annex B. (See

PMCM TV's "Alternative PSIP Proposal" at p. 4.) PMCM invited the Commission staff themselves to check with Dr. Chernock to get his input since it was his group that knew exactly how the protocols are to work. The staff either refused to get that input or did not get the answer they wanted. In either case, its turning of a blind eye and ear to the source most likely to elucidate an issue is reprehensible and suggests that the Bureau was more interested in reaching a pre-ordained result than in arriving at the best resolution for the public and the industry.

In reaching its conclusions, the Bureau pointed to several precedents,¹¹ none of which are helpful. Because PSIPs are usually adopted by stations without any Commission involvement whatsoever, the case law on this matter is unusually sparse. The *Associated Christian Television System, Inc.* case relied on by the Bureau¹² simply stands for the proposition that a station must use as its major virtual channel the NTSC channel it used prior to the digital transition. Application of that principle here would require major channel 3 to be assigned to WJLP, which is presumably not what the Bureau intends to prove. The Bureau also relies on an unreported case involving station KCWT's conflict with a Mexican station, but the case arose because Mexico does not follow the same PSIP rules applicable to American stations. The Bureau therefore had to exercise its discretion to assign a different major channel than the American PSIP protocols would have dictated, and, given that flexibility to deviate from Annex B, the Bureau understandably selected a major channel not assigned to any other overlapping station. The instant case obviously does not involve international coordination with a non-PSIP compliant regulatory regime. Finally, the Bureau points to the Seaford, DE case for support. In that case¹³ the Bureau inexplicably departed

¹¹ DRO at Paras. 39-41.

¹² 25 FCC Rcd. 9237 (Vid. Div. 2003)

¹³ *Post-Transition Table of DTV Allotments, Television Broadcast Stations (Seaford, Delaware)*, Report and Order, 25 FCC Rcd 4466 (Video Div. 2010)

from its previously declared policy of dealing with PSIP issues at the licensing stage rather than at the allocation stage.¹⁴ But in any case, Seaford is distinguishable from Middletown because it actually did involve the situation of a brand new station being assigned to a market. The correct Annex B paragraph to apply would therefore have been Paragraph 2, with a different minor channel from Fox's virtual channel in Washington, DC to account for the overlap. The fact that the Bureau erroneously and precipitously relied on Paragraph (4) to assign the Seaford license a different virtual channel number should not be a reason to repeat that error here.

Strangely, in looking for precedential guidance, the Bureau overlooked the fact that the new Atlantic City, NJ station, WACP, adopted channel 4 as its major virtual channel, as prescribed by Paragraph 2 of Annex B. As demonstrated by maps submitted by PMCM, WACP's contour significantly overlaps the contour of NBC's New York station, WNBC, which also uses major virtual channel 4. Indeed, the two overlapping stations use the *identical* major/minor channel combination without any apparent confusion or "virtual interference" whatsoever. And these stations are not unique. As demonstrated by PMCM, there are more than a hundred TV stations in the United States that have overlapping identical virtual channel numbers and manage to coexist peacefully without interference or confusion. While the *DRO* quibbles about the number of stations nationwide in this category,¹⁵ the fact remains that the Bureau must know or should have known that in the real world overlapping virtual major channel numbers do not create any of the dire consequences conjured by Meredith. Yet it used this fiction to keep the station off the air entirely

¹⁴ April 17, 2014 Letter from Hossein Hashemzadi.

¹⁵ It is unclear from the *DRO* why some of the overlapping identical virtual channel combos involving LPTV stations were deemed insignificant by the Bureau. Whether the low power stations are required to comply with the PSIP rules or not, the key fact is that the overlapping virtual channels have caused no problem to the public. And in the numerous cases where full power stations have overlap, the absence of any complaints should further corroborate PMCM's proof that overlap situations have none of the calamitous consequences projected by Meredith and CBS. The Bureau has unquestionably created confusion to the New York and New Jersey viewing public and the loss of a program service without any concomitant benefit to anyone.

for a time, to keep it from the majority of cable households, and to force it to accept a much less desirable over-the-air and cable channel position.

IV. The Significance of Keeping Channel 3

The Bureau fought tooth and nail to keep PMCM from being allowed to relocate its channel 3 station to New Jersey as required by Section 331 of the Communications Act. It must be recalled that in 2009 the Commission had directly violated the declared policy of the United States to ensure that every state was allocated a commercial VHF station. It actually *removed* the one commercial VHF TV station that New Jersey had in 2009. Only PMCM's relocation notification prompted the Commission to belatedly obey the law, in the meantime putting PMCM's proposed relocation in the deep freeze. (WACP, whose channel was allocated to New Jersey in response to PMCM's action, was allocated, auctioned, granted and constructed while PMCM's relocation languished.) Once WJLP finally, under court order, was allowed to go on the air in New Jersey, it began delivering the Jersey-centric, family-friendly programming it had long contemplated. The station was recently recognized as the best TV station in the state for its news and public affairs coverage. But the Bureau has continued a guerilla war against this station by stripping it of the main rights and privileges associated with VHF licenseeship

First, by declaring that WJLP must use major channel 33 as its over-the-air channel for cable carriage purposes, the Bureau has relegated the station to the part of the cable channel lineup used by non-VHF channels. Instead of being in the same over-the-air and cable TV neighborhood as all of the other commercial VHF stations in the market, WJLP has been exiled to broadcast Siberia. Members of the New Jersey public understandably do not perceive the station as a VHF channel, so they lose the very benefit that Congress tried to convey. And because the Bureau has unlawfully delayed requiring the cable systems to accommodate WJLP's must carry demand, more than 60% of

the New York DMA households cannot see the channel at all. Second, many prospective WJLP viewers try to receive the station over the air using their off air antennas. Unfortunately, as the Bureau must have known, most over-the-air receive antennas do not pick up low-band VHF channels. Many frustrated consumers have reported searching for channel 33 on their sets, but they can't find it because WJLP's over-the-air channel can't be received by their antenna. The Bureau's statement that use of virtual channel 33 rather than virtual channel 3 "has no impact whatsoever on the station's over the air audience reach" (*DRO* at Para. 48) is therefore patently false. In fact, it is a large part of what this battle has been all about. At the same time, unaccountably, many viewers find themselves somehow picking up CBS's RF channel 33 station when tuning in to WJLP's PSIP, or, conversely, getting WJLP's PSIP channel 33 programming when they are trying to watch CBS. (None of this occurred when WJLP used virtual channel 3.10.) The result is that both cabled viewers and over-the-air viewers are incapable of receiving the VHF station that Congress and the Court required the Commission to make available to them. This patent and calculated undermining of the law is unworthy of the Commission and contemptuous of the authorities whose directives the Commission is charged with obeying. Given the history and purpose of this channel's relocation to New Jersey, the Bureau should have assigned the station a VHF virtual channel even if the PSIP protocols did not otherwise require it.¹⁶

V. Restricted Status of the Docket

The extraordinary way that the Bureau has dealt with this matter is underscored by the procedures applied by the Bureau. First, in no other case involving PSIP assignment (including the

¹⁶ The Bureau had recognized early on that the Commission has always retained the discretion, to the extent broadcasters have some unique situation that is not provided for in the PSIP protocols, "to grant exceptions on a case-by-case basis." *Second Periodic Review*, 19 FCC Rcd. 18279, §153 (2004).

ones relied on by the Bureau) has the Commission felt compelled to open a “docket” to consider the matter. Yet here, after acknowledging that it understood the urgency of getting the matter resolved and promising to do so “without undue delay,” the Bureau opened a docket to consider the matter, vastly multiplying the number of parties and injecting months of delay into the process. It took 8 months to issue a decision in the docket. Significantly, the Bureau ignored the strongly supportive comments of over 400 members of the public who took the time to submit a comment. Many of these people have certainly lost access to the family-friendly programming they lauded, with no concomitant benefit to anyone else.

The main benefit of an FCC docket is that it encourages not only public participation but the opportunity to present one’s positions to the Commission on a “permit-but-disclose” basis. §1.1206(a) (3) expressly provides that declaratory ruling proceedings like the instant docket fall into the permit-but-disclose category for ex parte purposes. In opening the docket, the Bureau did not declare the proceeding to be restricted, nor there any basis to do so.¹⁷ Yet when representatives of PMCM sought to meet with the Bureau’s staff to run through the Annex B analysis, they were advised that the proceeding was restricted. When interested representatives of New Jersey’s Congressional delegation attempted to engage the Commission’s legislative staff on the matter, they too were advised that the matter was restricted. Yet imposition of this status without any authority whatsoever was directly inconsistent with §1.1206. It had the effect of preventing PMCM, concerned members of Congress, and anyone else from presenting their views on this important matter personally to Commission authorities. The unexplained, undocumented, and unprecedented imposition of this ban on personal communications sounds strangely like the “double secret probation” of Animal House fame - an unexplained, unidentified form of probation not found in any

¹⁷ See *Media Bureau Seeks Comment on Request for Declaratory Ruling*, 29 FCC Rcd 10556 (Media Bureau, 2014)

rule and not supported by any law. The Commission should lift this bizarre probation from the case for purposes of this application for review and any further proceedings that may ensue.

VI. Negative Impact on Repacking

PMCM has consistently warned the staff that adoption of the principle espoused here by the Bureau will significantly tie the Commission's hands when it comes to repacking channels after the Incentive Auction. Because the Bureau's formulation forbids any overlap of virtual major channel numbers, it means that the Commission's channel assignment algorithm must account for and prevent any such overlap, in addition, obviously, to preventing any overlap of actual interfering RF contours. This exponentially complicates the process. The Bureau's reaction to this concern is that (a) this situation will rarely arise, and (b) the Commission will deal with such prohibited overlaps if someone complains. Neither response holds water.

First, there are already over a hundred stations with this prohibited overlap in the U.S. Many of these situations will persist after the repacking, so the Commission must account for them in assigning both real and virtual channels. Second, one can easily see how new overlaps would develop as a result of channel sharing agreements which necessitate changes in transmitter locations and/or communities of license. Recalling that even a scintilla of overlap of virtual major channels is prohibited, there could very well be situations where channel shares involving site moves of ten or twenty miles would be precluded solely by the newly declared virtual major channel overlap taboo. The Commission will thus have discouraged or prevented the very channel sharing mechanism which it has striven to encourage. Finally, the approach of dealing with prohibited overlaps only if somebody complains is an unprincipled and untenable policy position. Either virtual channel overlaps are prohibited by the Commission's rules or they are not. The Commission cannot deliberately adopt a repacking process that ignores the requirements of its own rules on

virtual channel overlap and ensures that those rules will be violated. If it could do that, it could just as easily repack stations with overlapping interference contours and then just make ad hoc adjustments only if somebody complains. And to deal with all of those complaints, the Bureau would need to open a public Docket and consider the matter for 8 or 9 months, preventing the station involved from operating or being on a cable system the entire time. That's no way to run a railroad -- or an administrative agency.

VII. Conclusion

PMCM urges the Commission to overrule the Bureau's assignment of major channel 33 to WJLP and instead either overrule the Bureau's violation of §1452(g)(A) of the Spectrum Act by restoring WJLP to virtual channel 3.1 or follow the precepts of Annex B by assigning it major channel 3/minor channel 10 et seq., effectuate the declared will of Congress and the Court of Appeals by granting the people of New Jersey true and full access to channel 3 as a perceived VHF station, and open the docket to normal permit-but-disclose presentations permitted by the rules.

Respectfully submitted,

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ATTACHMENT A

Annex B: Additional Constraints on Virtual Channel Table For the U.S. (Normative)

1. ASSIGNMENT OF MAJOR CHANNEL NUMBER VALUES FOR TERRESTRIAL BROADCAST IN THE U.S.

The assignment of major_channel_number values in the U.S. shall be based on the rules below.

- 1) For broadcasters with existing NTSC licenses, the major_channel_number for the existing NTSC channels, as well as the digital virtual channels, controlled by the broadcaster, shall be set to the current NTSC RF channel number. E.g., assume a broadcaster who has an NTSC broadcast license for RF channel 13 is assigned RF channel 39 for digital ATSC broadcast. That broadcaster is required to use major_channel_number 13 for identification of the analog NTSC channel on RF channel 13, as well as the digital virtual channels it is controlling on RF channel 39.
- 2) For a new broadcaster without an existing NTSC license, the major_channel_number for the digital virtual channels controlled by the broadcaster shall be set to the FCC assigned RF channel number for ATSC digital TV broadcast. E.g., assume a broadcaster who currently has no NTSC broadcast license applies and receives a license for digital ATSC broadcast on RF channel 49. That broadcaster is required to use major_channel_number 49 for identification of the digital virtual channels that it is controlling on RF channel 49.
- 3) If during or at the end of the transition period, the RF channel assigned to a broadcaster for digital ATSC broadcast is changed for any reason, the major_channel_number used by that broadcaster shall not change.
- 4) If, after the transition, a previously used NTSC RF channel in a market is assigned to a newly-licensed DTV broadcaster in that market, the newly-licensed DTV broadcaster shall use, as his major_channel_number, the number of the DTV RF channel originally allocated to the previous NTSC licensee of the assigned channel.
- 5) If a broadcaster owns or controls broadcast licenses for two or more different RF channels having overlapping service areas, he may use a common major_channel_number for all services on all channels. He may choose the major_channel_number as determined above for any one of the RF channels. The values in the minor_channel_number fields must be partitioned to insure that there is no duplication of the two-part channel number in the DTV service area, including the overlapping DTV service areas of other broadcasters using that same major_channel_number.
- 6) The two-part channel numbers for other broadcasts may be included in the DTV transport stream, provided that the channel_TSID and source_id are exactly associated with the two-part channel number combinations used by the referenced broadcaster and there is no duplication with those used by any broadcaster whose DTV service¹⁶ area overlaps with the emitting station's DTV service¹⁷ area.

¹⁶ CFR 47 73.622(e) [13]

¹⁷ CFR 47 73.622(e) [13]

- 7) A broadcaster may include in the transmitted multiplex programming originating from a different licensed broadcaster and use the major/minor channel numbers of the original broadcast if the major/minor channel number combinations are coordinated in the local broadcast area to avoid conflicts. The coordination process is beyond the scope of this document.
- 8) The provisions listed above assign major_channel_number values 2 through 69 uniquely to broadcasters licensed to broadcast Digital ATSC signals and guarantee that the two-part channel number combinations used by a broadcaster will be different from those used by any other broadcaster with an overlapping DTV service¹⁸ area.
- 9) Values for major_channel_number from 70 to 99 may be used to identify groups of digital services carried in an ATSC multiplex that the broadcaster wishes to be identified by a different major channel number. Values 70 through 99 must be unique in each potential receiving location or the receiver will not be able to correctly select such services. For example a local broadcaster transmitting community college lectures in its bit stream may want to use a major_channel_number different than its own major_channel_number for the virtual channel carrying the lectures. The assessment of the feasibility of using this capability, as well as the coordination process for assignment of these major_channel_number values is beyond the scope of this document.
- 10) For a translated signal, the major/minor channel numbers shall remain the same as the original broadcast station unless the major channel conflicts with a broadcaster operating in the service area of the translator. In that case, the translator shall change the major number to a non-conflicting number.

2. REQUIREMENT TO TRANSMIT ANALOG TRANSMISSION SIGNAL ID

Broadcasters which reference an NTSC signal by inserting a channel_TSID in a VCT shall cause insertion of an analog Transmission Signal ID within the VBI of each referenced NTSC signal per CEA-608-C [3]. Refer to Annex D Section 9 for a discussion of the use of the analog Transmission Signal ID.

¹⁸ CFR 47 73.622(e) [13]

CERTIFICATE OF SERVICE

I, Donald J. Evans, hereby certify that on this 6th day of July, 2015, I caused copies of the foregoing "Application for Review" to be placed in the U.S. Postal Service, first class postage prepaid and/or, as noted below, sent by electronic mail to the following:

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